

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

NOLAN JORDAN,

Case No. 1:20-cv-01658-ADA-SAB (PC)

Plaintiff,

FINDINGS AND RECOMMENDATIONS REGARDING DEFENDANT'S EXHAUSTION MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR DISCOVERY

ARCE, et al.,

(ECF Nos. 38, 41)

Plaintiff Nolan Jordan is proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Currently before the Court is Defendant Arce's exhaustion motion for summary judgment, filed January 12, 2022.

I.

PROCEDURAL BACKGROUND

This action is proceeding against Defendant Arce¹ and three unidentified ICC members for deliberate indifference to Plaintiff's safety in violation of the Eighth Amendment.²

Defendant Arce filed an answer on August 5, 2021.

On October 7, 2021, Magistrate Judge Barbara A. McAuliffe conducted a settlement conference, but the case did not settle.

¹ Erroneously sued as “Arcee.”

² The unidentified ICC members have not yet been identified or served with process.

1 On October 12, 2021, the Court issued the discovery and scheduling order.

2 On January 12, 2022, Defendant Arce filed an exhaustion motion for summary judgment.

3 On January 27, 2022, Plaintiff filed an opposition, and Defendant filed a reply on

4 February 3, 2022. On February 25, 2022, Plaintiff filed a surreply.

5 **II.**

6 **LEGAL STANDARD**

7 **A. Statutory Exhaustion Requirement**

8 The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust “such
9 administrative remedies as are available” before commencing a suit challenging prison
10 conditions.” 42 U.S.C. § 1997e(a); see also Ross v. Blake, 578 U.S. 632, 638 (2016) (“An
11 inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones.”).
12 Exhaustion is mandatory unless unavailable. “The obligation to exhaust ‘available’ remedies
13 persists as long as *some* remedy remains ‘available.’ Once that is no longer the case, then there
14 are no ‘remedies … available,’ and the prisoner need not further pursue the grievance.” Brown
15 v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis in original) (citing Booth v. Churner, 532
16 U.S. 731, 739 (2001)).

17 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter
18 v. Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by
19 the prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. at 741, and
20 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing
21 Porter, 534 U.S. at 524).

22 The failure to exhaust is an affirmative defense, and the defendants bear the burden of
23 raising and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino v. Baca, 747 F.3d
24 1162, 1166 (9th Cir. 2014). “In the rare event that a failure to exhaust is clear from the face of
25 the complaint, a defendant may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at
26 1166. Otherwise, the defendants must produce evidence proving the failure to exhaust, and they
27 are entitled to summary judgment under Rule 56 only if the undisputed evidence, viewed in the
28 light most favorable to the plaintiff, shows he failed to exhaust. Id.

1 **B. Summary Judgment Standard**

2 Any party may move for summary judgment, and the Court shall grant summary
3 judgment if the movant shows that there is no genuine dispute as to any material fact and the
4 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks
5 omitted); Albino, 747 F.3d at 1166; Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir.
6 2011). Each party's position, whether it be that a fact is disputed or undisputed, must be
7 supported by (1) citing to particular parts of materials in the record, including but not limited to
8 depositions, documents, declarations, or discovery; or (2) showing that the materials cited do not
9 establish the presence or absence of a genuine dispute or that the opposing party cannot produce
10 admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The
11 Court may consider other materials in the record not cited to by the parties, although it is not
12 required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237
13 F.3d 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017
14 (9th Cir. 2010).

15 The defendants bear the burden of proof in moving for summary judgment for failure to
16 exhaust, Albino, 747 F.3d at 1166, and they must "prove that there was an available
17 administrative remedy, and that the prisoner did not exhaust that available remedy," id. at 1172.
18 If the defendants carry their burden, the burden of production shifts to the plaintiff "to come
19 forward with evidence showing that there is something in his particular case that made the
20 existing and generally available administrative remedies effectively unavailable to him." Id. "If
21 the undisputed evidence viewed in the light most favorable to the prisoner shows a failure to
22 exhaust, a defendant is entitled to summary judgment under Rule 56." Id. at 1166. However,
23 "[i]f material facts are disputed, summary judgment should be denied, and the district judge
24 rather than a jury should determine the facts." Id.

25 **III.**

26 **DISCUSSION**

27 **A. Description of CDCR's Administrative Remedy Process**

28 Plaintiff is a state prisoner in the custody of the California Department of Corrections and

1 Rehabilitation (“CDCR”), and CDCR has an administrative remedy process for inmate
2 grievances. Cal. Code Regs. tit. 15, § 3084.1 (2014). Compliance with section 1997e(a) is
3 mandatory and state prisoners are required to exhaust CDCR’s administrative remedy process
4 prior to filing suit in federal court. Woodford v. Ngo, 548 U.S. 81, 85-86 (2006); Sapp v.
5 Kimbrell, 623 F.3d 813, 818 (9th Cir. 2010). CDCR’s administrative grievance process for non-
6 medical appeals consists of three levels of review: (1) first level formal written appeals; (2)
7 second level appeal to the Warden or designees; and (3) third level appeal to the Office of
8 Appeals (OOA). Inmates are required to submit appeals on a standardized form (CDCR Form
9 602), attach necessary supporting documentation, and submit the appeal within thirty days of the
10 disputed event. Cal. Code Regs. tit. 15, §§ 3084.2, 3084.3(a), 3084.8(b). The California Code of
11 Regulations also requires the following:

12
13 The inmate or parolee shall list all staff member(s) involved and shall describe their
14 involvement in the issue. To assist in the identification of staff members, the inmate or
15 parolee shall include the staff member’s last name, first initial, title or position, if known,
16 and the dates of the staff member’s involvement in the issue under appeal. If the inmate
or parolee does not have the requested identifying information about the staff member(s),
he or she shall provide any other available information that would assist the appeals
coordinator in making a reasonable attempt to identify the staff member(s) in question.

17
18 Cal. Code Regs. tit. 15, § 3084.2(a)(3).³

19
B. Summary of Allegations Underlying Plaintiff’s Claims

20 In June 2018, while Plaintiff was housed at California State Prison, Los Angeles County
21 in Lancaster, he was classified as a “general population” inmate. Shortly after he was transferred
22 to North Kern State Prison (NKSP) where he was assigned to a “non-designated” yard which
23 was previously a “protected custody” yard. Plaintiff and twenty-five other general populations
24 inmates were transferred from Lancaster to NKSP and assigned to the non-designated yard.

25
26 _____
27 ³ Effective June 1, 2020, the new rules are set out in Cal. Code Regs. tit. 15, §§ 3480–3486. For purposes of these
Findings and Recommendations, all citations refer to the 2018 version of the regulations which were effective at
the time relevant to Plaintiff’s claims.

1 All White and Black inmates who transferred from Lancaster went straight to the non-
2 designated yard. Plaintiff and ten other Hispanic inmates were placed in the reception area C-1
3 and were trickled out to the non-designated. However, as Hispanic inmates were sent to the non-
4 designated years violence began. Plaintiff spent two days intending not to be one to initiate
5 violence, but he was forced to defend himself on two separate documented incidents.

6 The non-designated previously protective custody population have a mindset of attacking
7 general population inmates. After the first incident in which Plaintiff was assaulted, he was sent
8 right back to the non-designated yard and assaulted a second time shortly thereafter. After the
9 second incident, Plaintiff was sent to the reception area waiting to be rehoused. Plaintiff was
10 placed in a locked stand-alone cage, and captain Arce told Plaintiff that if he went back to the
11 non-designated yard and got his fellow Hispanic inmates to “program positively” on the non-
12 designated yard for him he would transfer Plaintiff in six months to any desired location. Arce
13 told Plaintiff if he didn’t comply with the demand, he would see to it that Plaintiff’s prison career
14 was ruined. Plaintiff told Arce that he was not in a position to tell other inmates how to program
15 in prison and he was not interested in helping him. Captain Arce got very angry and told
16 Plaintiff that he was “fucked” and his career in general population was over. Arce further
17 advised Plaintiff that “he was going to make sure that [Plaintiff] would get beat if not stabbed
18 everywhere [he] went!”

19 Shortly after Plaintiff’s conversation with Arce, Plaintiff was housed in the reception area
20 in the dorm on C-yard where he was assaulted by general population inmates in a two on one
21 assault. While Plaintiff was being examined by medical staff, captain Arce and lieutenant Jamie
22 went to see Plaintiff and told him that “stuff like this would keep happening to me unless I took
23 them up on their non designated yard[,]” but Plaintiff refused. Captain Arce told lieutenant
24 Jamie to lock up Plaintiff and he was placed in administrative segregation. Plaintiff
25 subsequently received a California Department of Corrections and Rehabilitation (CDCR) Form
26 114-D (lock up order) which falsely stated that Plaintiff was requesting security housing unit
27 placement.

28

1 Plaintiff went to the Institutional Classification Committee (ICC) hearing to be released
2 from administrative segregation and told them about captain Arce's threat and requested that the
3 false Form 114-D be removed from his central file. The committee told Plaintiff if he had done
4 as requested by captain Arce he would not have the problem and refused to remove the Form
5 114-D from his central file. The committee told Plaintiff he may as well go to the sensitive
6 needs yard, but Plaintiff refused and asked to be removed to the general population.

7 Plaintiff was in administrative segregation for about a month and was then sent back to
8 the general population reception yard. Captain Arce's "threat once again rang true" as Plaintiff
9 was attacked by four inmates and required hospitalization. Because of the false 114-D, Plaintiff
10 has been branded a sensitive needs yard inmate in the general population. Plaintiff lives in fear
11 that he will be physically injured because the false 114-D remains in his central file.

12 **C. Statement of Undisputed Facts⁴**

13 1. Defendant was a correctional officer at North Kern State Prison (NKSP) at the
14 time of the events in Plaintiff's complaint, and the events about which Plaintiff complains
15 alleged occurred there. (ECF No. 1; ECF No. 27.)

16 2. The California Department of Corrections and Rehabilitation (CDCR) provides an
17 administrative grievance process, which in 2018 contained three levels of review, for grieving
18 issues that affect inmates. (Cal. Code Regs. tit. 15, div. 2, ch. 1, art. 8; Declaration of Oscar
19 Magallanes (Magallanes Decl.) ¶¶ 3, 5, 6, 10, 11; Declaration of Howard E. Moseley (Moseley
20 Decl.) ¶ 5.)

21 3. The NKSP grievance office receives and reviews all non-healthcare grievances at
22 the institutional level. (Magallanes Decl. ¶¶ 2-4.)

23 4. CDCR and the NKSP Grievance Office use a computer program called the Inmate
24 Appeals Tracking System (IATS) to electronically log and track inmate grievances and CDCR's
25 response to them through all levels of review. (Magallanes Decl. ¶¶ 1, 15; Moseley Decl. ¶¶ 3,
26 4, 7.)

27
28 ⁴ Hereinafter referred to as "UF."

1 5. All grievances received by NKSP's Appeals Office, even those that are rejected
2 or cancelled, are assigned log numbers, or at least tracked, for record-keeping purposes.
3 (Magallanes Decl. ¶¶ 4, 8, 9.)

4 6. Between June 1, 2018, and November 9, 2020, Plaintiff submitted three inmate
5 grievances at NKSP concerning the allegations of the complaint. (Magallanes Decl. ¶¶ 13, 14,
6 15, 20 & Exs. A-E.)

7 7. In Appeal Log Number NKSP-D-18-02586, dated by Plaintiff June 30, 2018,
8 Plaintiff's first-level grievance complained about three assaults after his transfer to NKSP as a
9 level 1 inmate and an active "southsider" that participated in NKSP's non-designated yard, and
10 requested to drop his sensitive needs designation and to transfer to another institution.
11 (Magallanes Decl. ¶ 16 & Ex. B.)

12 8. In grievance NKSP-D-18-02586, Plaintiff specifically complained that mixing
13 former general population and sensitive needs inmates, and his participation in the program,
14 "puts lives in danger and is greatly flawed and it has gotten [plaintiff] assaulted three times",
15 resulting in a couple of NKSP administrators "purposely put[ting] his life in danger".
16 (Magallanes Decl. ¶ 16 & Ex. B.)

17 9. In grievance NKSP-D-18-02586, Plaintiff makes no mention about (1) Defendant
18 or any other specific correctional employee, or (2) any threat/communication or conduct in
19 retaliation for failing to assist with positive programming of other inmates; the grievance makes
20 no claim that a false assertion was made that he requested sensitive needs yard placement or that
21 a false Form 114-D was placed in Plaintiff's central file. (Magallanes Decl. ¶ 16 & Ex. B.)

22 10. On July 2, 2018, the Appeals Office rejected Plaintiff's appeal pursuant to
23 California Code of Regulations, title 15, section 3084.6(b)(14) because it was not submitted on
24 the departmentally approved form; more specifically, that Plaintiff completed the continuation
25 page on the wrong form and that the information from his white sheet of paper should be put
26 onto the CDCR 602A Attachment provided to him. Plaintiff resubmitted his grievance on July 6,
27 2018, which was again rejected on that date because he failed to attach supporting document.
28 (Magallanes Decl. ¶ 16 & Ex. B.)

1 11. Plaintiff did not appeal the Appeals Office's rejection decision in Appeal Log
2 Number NKSP-D-18-02586. (Magallanes Decl. ¶ 16 & Ex. B; Moseley Decl. ¶¶ 7, 8, 9 & Ex.
3 A.)

4 12. In Appeal Log Number NKSP-D-18-02760, dated by Plaintiff July 15, 2018,
5 Plaintiff's first-level grievance complained about three assaults after his transfer to NKSP's non-
6 designated yard. (Magallanes Decl. ¶ 17 & Ex. C.)

7 13. In grievance NKSP-D-18-02760, Plaintiff specifically complained the assaults
8 were the result of mixing former general population and sensitive needs inmates and that he was
9 trying to "positively program" on the non-designated yard. He contested the Rules Violation
10 Reports against him regarding the June 28 and June 29, 2018 physical altercations. (Magallanes
11 Decl. ¶ 17 & Ex. C.)

12 14. In grievance NKSP-D-18-02760, Plaintiff makes no mention about (1) Defendant
13 or any other specific correctional employee, or (2) any threat/communication or conduct in
14 retaliation for failing to assist with positive programming of other inmates; the grievance makes
15 no claim that a false assertion was made that he requested sensitive needs yard placement or that
16 a false Form 114-D was placed in Plaintiff's central file. (Magallanes Decl. ¶ 17 & Ex. C.)

17 15. On July 16, 2018, the Appeal Office rejected Plaintiff's appeal pursuant to
18 California Code of Regulations, title 15, section 3084.6(b)(8) because it involved multiple issues
19 that did not derive from a single event, or were not directly related; i.e., attempting to appeal two
20 separate Rules Violation Reports. (Magallanes Decl. ¶ 17 & Ex. C.)

21 16. In Appeal Log Number NKSP-D-18-03073, dated by Plaintiff August 1, 2018,
22 Plaintiff's second-level appeal concerned Rules Violation Report (RVR) Log #5204043 against
23 him dated June 28, 2018, for the specific act of "battery on a prisoner". Plaintiff requested that
24 the RVR be dismissed and his lost credits restored, and that the CDCR 7219s related to the
25 incident reflect that no battery occurred. Plaintiff's claim was that he was inappropriately found
26 guilty of the charge, and that there was no fight or physical altercation, just a loud
27 misunderstanding. (Magallanes Decl. ¶ 18 & Ex. D.)

28

1 17. While Plaintiff's grievance NKSP-D-18-03073 claimed the incident was the
2 direct result of general population inmates and sensitive needs inmates being housed together, as
3 with his other appeals he makes no mention of Defendant (or any other particular corrections
4 personnel), or any threat/communication or conduct in retaliation for failing to assist with the
5 positive programming of other inmates; the grievance makes no claim that a false assertion was
6 made that he requested sensitive needs yard placement or that a false Form 114-D was placed in
7 Plaintiff's central file. (Magallanes Decl. ¶ 18 & Ex. D.)

8 18. On August 3, 2018, the Appeals Office partially granted the second-level appeal
9 in that a review of the CDCR 7219s related to the incident was conducted, and denied in that
10 Plaintiff's RVR was not dismissed and his lost credits were not restored. Plaintiff was advised
11 that the issue may be submitted for a Director's level of review, if he so desired. (Magallanes
12 Decl. ¶ 18 & Ex. D; Moseley Decl. ¶¶ 7, 8 and 9 & Ex. A.)

13 19. In Appeal Log Number NKSP-D-18-03432, dated by Plaintiff August 28, 2018,
14 Plaintiff's first-level appeal complained (1) that he was beaten up and assaulted four times
15 because of his compliance with CDCR non-designated yard policy (that he was previously
16 designated general population but had to designate sensitive needs yard to assure his safety), (2)
17 that he witnessed staff looking up inmates in SOMS for inmates to "clean house"; and requested
18 (1) a transfer, and (2) that his sensitive needs yard chronos be removed from his file.
19 (Magallanes Decl. ¶ 19 & Ex. E.)

20 20. In grievance NKSP-D-18-03432, Plaintiff makes no mention about (1) Defendant
21 or any other specific correctional employee, or (2) any threat/communication or conduct in
22 retaliation for failing to assist with positive programming of other inmates; the grievance makes
23 no claim that a false assertion was made that he requested sensitive needs yard placement or that
24 a false Form 114-D was placed in Plaintiff's central file. (Magallanes Decl. ¶ 19 & Ex. E.)

25 21. On August 31, 2018, the Appeal Office rejected Plaintiff's appeal pursuant to
26 California Code of Regulations, title 15, section 3084.6(b)(8) because it involved multiple issues
27 that did not derive from a single event, or were not directly related. The Appeals Office advised
28 Plaintiff to resubmit new appeals separating the transfer appeal issue, request to remove sensitive

1 needs chronos, and staff looking up inmates in SOMS – and to note how he knows about staff
2 looking up inmates to “clean house”, when it happened, and to identify the officers. (Magallanes
3 Decl. ¶ 19 & Ex. E.)

4 22. Plaintiff did not submit new or other appeals relating to grievance NKSP-D-18-
5 03432.

6 (Magallanes Decl. ¶ 20 & Ex. A; Moseley Decl. ¶¶ 7, 8, 9 & Ex. A.)

7 23. Plaintiff did not submit any other appeals to NKSP, related or unrelated to the
8 allegations in his Complaint, during the relevant time frame of this lawsuit; from Plaintiff’s
9 transfer to NKSP in June 2018 to the filing of Plaintiff’s Complaint on November 9, 2020.
10 (Magallanes Decl. ¶ 20 & Ex. A.)

11 24. Decisions by the CDCR Office of Appeals (OOA) represent the final level of
12 review in the Department’s grievance process and are rendered on behalf of the Secretary of the
13 Department. (Magallanes Decl. ¶ 20 & Ex. A.)

14 25. In Appeal Log No. 1811983 (an appeal of Grievance Log No. NKSP-18-03073),
15 Plaintiff’s third-level appeal alleged that the Senior Hearing Officer inappropriately found
16 Plaintiff guilty of Battery on a Prisoner on June 28, 2018 (Rules Violation Report Log No.
17 520403). Plaintiff asserted that no battery or physical altercation took place, just a loud
18 misunderstanding that was a direct result of sensitive needs yard inmates and general population
19 inmates being housed together as a result of Departmental policy. Plaintiff also alleged that
20 Plaintiff was not expected to be on that yard because Plaintiff was a general population inmate
21 and an active STG II “southsider,” but that Plaintiff intended to program positively and was
22 taken off the yard at the first opportunity. (Moseley Decl. ¶¶ 7, 8 & Ex. B.)

23 26. In Appeal Log No. 1811983, Plaintiff requested that the medical reports related to
24 the incident (the CDC Form 7219s) be reviewed because they would demonstrate that no battery
25 occurred. Plaintiff also requested that the rules violation be dismissed and Plaintiff’s credit loss
26 be restored. (Moseley Decl. ¶ 8 & Ex. B.)

27 27. Nowhere in Appeal Log No. 1811983 does Plaintiff name Defendant or allege
28 any threat, communication, or conduct by Defendant in retaliation for failing to assist with the

1 positive programming of other inmates; the grievance makes no claim that a false assertion was
2 made that he requested sensitive needs yard placement or that a false Form 114-D was placed in
3 Plaintiff's central file. (Moseley Decl. ¶ 8 & Ex. B.)

4 29. On November 28, 2018, Appeal Log No. 1811983 was denied by the third-level
5 reviewer on the grounds that no good cause existed to modify the finding or disposition of the
6 rules violation; Plaintiff has no other third level appeal. (Moseley Decl. ¶¶ 7, 8 & Exs. A and B.)

7 **D. Plaintiff's Surreply**

8 Plaintiff filed an unauthorized surreply on February 25, 2022.

9 Neither the Federal Rules of Civil Procedure, nor the Local Rules for the Eastern District
10 of California permit the filing of a surreply as a matter of right. See Garcia v. Biter, 195
11 F.Supp.3d at 1131 (E.D. Ca. July 18, 2016) (noting the plaintiff did not have a right to file
12 a surreply under the local rules or under the Federal Rules of Civil Procedure). However, district
13 courts have discretion to permit, or preclude, a surreply. Id. at 1133 (other citations omitted).
14 While courts are required to provide pro se litigants leniency, the Court generally views motions
15 for leave to file a surreply with disfavor and will not consider granting a motion seeking leave to
16 file a surreply absent good cause shown. Id. (other citations omitted). Although Plaintiff does
17 not have a right to file a surreply and did not seek leave to do so, the Court will exercise its
18 discretion and consider the surreply in ruling on the instant motion for summary judgment.

19 **E. Request for Discovery**

20 In his opposition, Plaintiff "requests from my C.D.C.R 'C-file' all C.D.C.R. – 128's
21 (including classification chronos), C.D.C.R. – 7219's (medical reports), C.D.C.R. – 114-D's
22 (lockup orders0, C.D.C.R. – 602's (inmate appeals), as well as all incidents reports from M-
23 facility, B-facility & C-facility at North Kern State Prison, from my arrival to transfer. All
24 Reports and Chronos requested are from 6-7-18 my arrival at N.K.S.P. up until my transfer from
25 N.K.S.P." (ECF No. 41 at 3.)

26 Federal Rule of Civil Procedure 56(d) permits a party opposing a motion for summary
27 judgment to request an order deferring the time to respond to the motion and permitting that
28 party to conduct additional discovery upon an adequate factual showing. Rule 56(d) provides that

1 the party must “show[] by affidavit or declaration that, for specified reasons, it cannot present
 2 facts essential to justify its opposition.” Fed. R. Civ. P. 56(d). “A party requesting a continuance
 3 pursuant to [Rule 56(d)] must identify by affidavit the specific facts that further discovery would
 4 reveal, and explain why those facts would preclude summary judgment.” Tatum v. City & Cty.
 5 of San Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006) (citations omitted).

6 “Though the conduct of discovery is generally left to a district court's discretion,
 7 summary judgment is disfavored where relevant evidence remains to be discovered, particularly
 8 in cases involving confined *pro se* plaintiffs.” Klingele v. Eikenberry, 849 F.2d 409, 412 (9th
 9 Cir. 1988). Thus, summary judgment in the face of requests for additional discovery is
 10 appropriate only where such discovery would be “fruitless” with respect to the proof of a viable
 11 claim. Jones v. Blanas, 393 F.3d 918, 930 (9th Cir. 2004). “The burden is on the nonmoving
 12 party, however, to show what material facts would be discovered that would preclude summary
 13 judgment.” Klingele, 849 F.2d at 412; see also Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995)
 14 (“The burden is on the party seeking to conduct additional discovery to put forth sufficient facts
 15 to show that the evidence sought exists.”). Moreover, “[t]he district court does not abuse its
 16 discretion by denying further discovery if the movant has failed diligently to pursue discovery in
 17 the past.” Conkle, 73 F.3d at 914 (quoting California Union Ins. Co. v. American Diversified
 18 Sav. Bank, 914 F.2d 1271, 1278 (9th Cir. 1990)).

19 Plaintiff fails to make the showing required under Rule 56(d). It is unclear whether
 20 plaintiff is claiming that he requires further discovery to oppose the pending summary judgment
 21 related to administrative exhaustion or whether he requires discovery regarding the merits of this
 22 case. Plaintiff's request to stay discovery does not show the specific reasons Plaintiff cannot
 23 present essential facts nor does it identify the specific facts further discovery would reveal.
 24 Accordingly, Plaintiff's request to stay discovery contained in his opposition should be denied
 25 for failing to comply with Rule 56(d).

26 **F. Analysis of Defendant's Motion**

27 Defendants argue that Plaintiff failed to properly complete the administrative appeal
 28 process as to any of his claims against Defendant for deliberate indifference prior to filing suit.

1 As stated in the Court's February 3, 2021, screening order, this action is proceeding on
2 Plaintiff's claim that Defendant Arce falsely accused Plaintiff "of requesting sensitive needs yard
3 and placing a Form 114-D in his central file, in order to 'purposely cause harm[.]'" (ECF No. 15
4 at 5.)

5 Defendant has shown, and Plaintiff does not dispute, that there was a process in place to
6 exhaust his administrative remedies. (UF 2-6.)

7 It is undisputed that the California Department of Corrections and Rehabilitation (CDCR)
8 provides an administrative grievance process, which in 2018 contained three levels of review, for
9 grieving issues that affect inmates. (UF 2.) The NKSP grievance office receives and reviews all
10 non-healthcare grievances at the institutional level. (UF 3.) CDCR and the NKSP Grievance
11 Office use a computer program called the Inmate Appeals Tracking System (IATS) to
12 electronically log and track inmate grievances and CDCR's response to them through all levels
13 of review. (UF 4.) All grievances received by NKSP's Appeals Office, even those that are
14 rejected or cancelled, are assigned log numbers, or at least tracked, for record-keeping purposes.
15 (UF 5.) Between June 1, 2018, and November 9, 2020, Plaintiff submitted three inmate
16 grievances at NKSP concerning the allegations of the complaint. (UF 6.)

17 1. Appeal No. NKSP-D-18-02586

18 In appeal log number NKSP-D-18-02586, self-dated June 30, 2018, Plaintiff complained
19 about three separate inmate assaults after his transfer to NSKP as a level 1 inmate and active
20 "southsider." Plaintiff was a participant in NKSP's non-designated yard and requested to drop
21 his sensitive needs designation to transfer to a different institution. (UF 7.) More specifically,
22 Plaintiff claimed that mixing former general population and sensitive needs inmates, and his
23 participation in the program, "puts lives in danger and is greatly flawed and it has gotten
24 [plaintiff] assaulted three times", and a couple of NKSP administrators "purposely put his life in
25 danger." (UF 9.)

26 Defendant argues this appeal did not identify him or grieve any of the deliberate
27 indifference claims at issue in this action. The Court agrees. Although Plaintiff complains about
28 his placement and housing in a non-designated yard, he fails to identify or name Defendant Arce

1 or set forth any misconduct on his part, namely, that Arce threatened Plaintiff in retaliation for
2 failing to assist with positive programming of other inmates. Nor does the appeal allege that
3 Plaintiff falsely requested sensitive needs yard placement or that a false Form 114-D was placed
4 in his central file. (UF 10.) Accordingly, this appeal does not satisfy the exhaustion
5 requirement. See Woodford v. Ngo, 548 U.S. at 90-91; see also Estrada v. California Corr. Inst.,
6 No. 1:18-cv-00599-AWI-SAB (PC), 2021 WL 3268555, at *8 (E.D. Cal. July 30, 2021) adopted
7 by, 2021 WL 4123686 (E.D. Cal. Sept. 9, 2021) (finding the plaintiff failed to properly exhaust
8 his administrative remedies because he did not name the defendant or specifically describe his
9 alleged wrongdoing as required by CDCR's regulations).

10 Furthermore, the appeal was rejected at the first level of review on July 2, 2018, because
11 it was not submitted on the department approved appeal form pursuant to California Code of
12 Regulations, title 15, section 3084.6(b)(14). (UF 10.) It was specifically noted that Plaintiff
13 completed the continuation page on the wrong form and that the information from his white
14 sheet of paper should be put onto the CDCR 602A Attachment provided to him. (Id.) Plaintiff
15 resubmitted his grievance on July 6, 2018, which was again rejected because he failed to attach
16 supporting documentation pursuant to California Code of Regulations, title 15, section
17 3084.6(b)(7).⁵ (Id.) These screen outs were proper under the applicable California Code of
18 Regulations. See, e.g., Jamison v. Palgummi, No. 2:13-cv-1705 AC P, 2014 WL 5781225, at *7
19 (E.D. Cal. Nov. 5, 2014) (noting that inmate appeal may be rejected if submitted on the
20 departmentally approved appeal form); see also Morris v. Daly, No. 2:12-cv-2845 JAM AC P,
21 2016 WL 796656, at *9 (E.D. Cal. Mar. 1, 2016) (noting that inmate appeal may be rejected if
22 missing necessary supporting documents). Plaintiff did not appeal the Appeal Office's rejection.
23 (UF 11.)

24 ///

25 ///

26 ///

27 ⁵ It was specifically noted that Plaintiff wished to be transferred to a Level I facility and have his SNY suffix
28 removed, but failed to submit any supporting documentation identifying that he had a current SNY suffix.
(Magallanes Decl. Ex B.)

1 2. Appeal No. NKSP-D-18-02760

2 In appeal log number NKSP-D-18-02760, self-dated July 15, 2018, Plaintiff alleged:

3
4 I am a level 1 inmate that has positively program[m]ed on M.S.E. facilities for 2 years. I
5 am now sitting in Ad-Seg after having been assaulted 3 times due to having taken part in
6 the mixing of G.P. inmates and S.N.Y. inmates. I've had only 1 R.V.R. in the past 2
7 years for possessing danger contraband (cell phone). Now because of this dangerous
8 policy of mixing G.P. and S.N.Y. inmates I have 2 R.V.R.'s for fighting. The first is for
9 being removed by an S.N.Y. for being a G.P. inmate (active Southsider) after I had spent
10 over 72 hours (meaning I was gonna stay & program). The second was for fighting as
11 well. But I was clearly a victim of a 2 on 1 removal for having spent over 72 hours on
12 the new M.S.F. program. The injuries on myself and the others involved clearly show I
13 was the victim. All 3 documented assaults on me were because I went to positively
14 program on the new C.D.C. policy of mixing G.P. & S.N.Y. inmates (w[h]ich is a forced
15 policy) . I have been assaulted 3x's and I have 2 serious R.V.R.'s for actively having a
16 roll in positively program[m]ing in this new C.D.C. policy. The only relief I've been
17 offered is to go SNY but that'll keep me in the same dangerous circumstance just vice
18 versa.

13 (Magallanes Decl. Ex. C; UF 13.)

14 It is clear that this appeal does identity or name Defendant Arce or set forth any
15 misconduct on his part, namely, that Arce threatened Plaintiff in retaliation for failing to assist
16 with positive programming of other inmates. (UF 14.) Nor does the appeal allege that Plaintiff
17 falsely requested sensitive needs yard placement or that a false Form 114-D was placed in his
18 central file. (Id.)

19 Furthermore, on July 16, 2018, the appeal was rejected at the first level of review
20 pursuant to California Code of Regulations, title 15, section 3084.6(b)(8) because it involved
21 multiple issues that did not derive from a single evidence, or were not directly related; i.e.,
22 attempting to appeal two separate Rule Violation Reports. (UF 15.)

23 3. Appeal No. NKSP-D-18-03073

24 In appeal log number NKSP-D-18-03073, self-dated August 1, 2018, Plaintiff challenged
25 the Rules Violation Report against him for "battery on a prisoner." (UF 17.) Plaintiff requested
26 that the Rules Violation report be dismissed and his lost credits restored, and that the CDCR
27 7219s related to the incident reflect that no battery occurred. (Id.) Although Plaintiff claimed
28

1 that the incident was the direct result of general population inmates and sensitive needs inmates
2 being housed together, as with the other appeals he makes no mention of Defendant, or any
3 threat/communication or conduct in retaliation for failing to assist with the positive programming
4 of other inmates; the grievance makes no claim that a false assertion was made that he requested
5 sensitive needs yard placement or that a false Form 1140D was placed in Plaintiff's central file.
6 (UF 17.)

7 On August 3, 2018, the appeal was partially granted at the second level in that a review
8 of the CDCR 7219s related to the incident was conducted, and denied with respect to Plaintiff's
9 Rules Violation Report being dismissed and his credit was not restored. (UF 18.) Plaintiff was
10 advised that he could appeal the decision to the Director's level review. (Magallanes Decl. Ex.
11 D.)

12 4. Appeal No. 1811983 (Appeal of No. NKSP-18-03073)

13 In appeal log number 1811983 (the third-level appeal of grievance log no. NKSP-18-
14 03073), Plaintiff alleged:

15 I was found guilty of this R.V.R. on 7-23-18. I am appealing it because no battery took
16 place. As in evidence of both mine and Cervantes' C.D.C.R. 7219s clearly show. There
17 are no offensive or defensive wounds, scratches, bruises, swollen, discolored or even
18 reddened areas on either of us. My hands were free of all such injuries as well as
19 Cervantes' arms and back that were supposed to have been struck multiple times by me.
20 The C.D.C.R. 7219s were filled out minutes after the incident & both of us were checked
21 multiple times (4 x's) within at least 30 minutes. There was just a loud misunderstanding
22 at the microwave oven. Food was thrown on the ground and table. But no punches
23 thrown. All this is due to the integration of general population inmates & S.N.Y.
24 inmates. I was not expected to program on that yard by the staff or the inmates presently
25 there (S.N.Y.'s) because I am G.P. & an active STG II Southsider. But my true intent
26 was to positively program on that yard as shown by my presence still being there after
27 72 hours. I feel that the first opportunity to have me taken off the yard has been used in
28 this case. I have even elected to once again be placed in another non[-]designated
program facility. I'm truly trying to program positively.

(Moseley Decl. Ex. B; UF 25.) Plaintiff requested that the medical reports related to the incident
(the CDC Form 7219s) be reviewed because they would demonstrate that no battery occurred.

1 Plaintiff also requested that the rules violation be dismissed and Plaintiff's credit loss be
2 restored. (UF 26.) The appeal was received by the OOA on August 16, 2018, and denied on
3 November 28, 2018, determining no good cause existed to modify the finding or disposition of
4 the rules violation. (UF 29.) This appeal does not name Defendant or allege any threat,
5 communication, or conduct by Defendant in retaliation for failing to assist with the positive
6 programming of other inmates; the grievance makes no claim that a false assertion was made that
7 he requested sensitive needs yard placement or that a false Form 114-D was placed in Plaintiff's
8 central file. (UF 27.)

9 5. Appeal No. NKSP-D-18-03432

10 In appeal log number NKSP-D-18-03432, self-dated August 28, 2018, Plaintiff alleged
11 that he had been beat up and assaulted four times because he complied with the CDCR non-
12 designated yard policy (that he was previously designated general population but had to
13 designate sensitive needs yard to assure his safety). (UF 19.) Plaintiff also claimed that he
14 observed staff members look up inmates on SOMS to "clean house." (Id.) Plaintiff requested a
15 transfer and that his sensitive needs yard chronos be removed from his file. (Id.) On August 31,
16 2018, the Appeal Office rejected Plaintiff's appeal pursuant to California Code of Regulations,
17 title 15, section 3084.6(b)(8) because it involved multiple issues that did not derive from a single
18 event, or were not directly related. The Appeals Office advised Plaintiff to resubmit new appeals
19 separating the transfer appeal issue, request to remove sensitive needs chronos, and staff looking
20 up inmates in SOMS – and to note how he knows about staff looking up inmates to "clean
21 house", when it happened, and to identify the officers. (UF 21.) Plaintiff did not submit new or
22 other appeals relating to grievance NKSP-D-18-03432. (UF 22.)

23 In this appeal, Plaintiff makes no mention about (1) Defendant or any other specific
24 correctional employee, or (2) any threat/communication or conduct in retaliation for failing to
25 assist with positive programming of other inmates; the grievance makes no claim that a false
26 assertion was made that he requested sensitive needs yard placement or that a false Form 114-D
27 was placed in Plaintiff's central file. (UF 20.)

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1 6. Plaintiff's Opposition

2 Defendant has submitted evidence that Plaintiff did not submit any other appeals to
3 NKSP, related or unrelated to the allegations in his Complaint, during the relevant time frame of
4 this lawsuit; from Plaintiff's transfer to NKSP in June 2018 to the filing of Plaintiff's Complaint
5 on November 9, 2020. (Magallanes Decl. ¶ 20 & Ex. A.) Therefore, Defendant has met his
6 burden to show that Plaintiff failed to exhaust administrative remedies available to him. Upon
7 this showing by Defendant, the burden shifts to Plaintiff to come forward with evidence showing
8 that something in his case made the existing administrative remedies effectively unavailable to
9 him. See Albino, 747 F.3d at 1172.

10 In opposition, Plaintiff contends that appeal no. NKSP-D-18-03432 exhausts his
11 deliberate indifference claims against Defendant Arce. (ECF No. 42 at 3.) The Court does not
12 agree for the reasons explained above. In appeal no. NKSP-D-18-03432, Plaintiff makes no
13 mention about (1) Defendant or any other specific correctional employee, or (2) any
14 threat/communication or conduct in retaliation for failing to assist with positive programming of
15 other inmates; the grievance makes no claim that a false assertion was made that he requested
16 sensitive needs yard placement or that a false Form 114-D was placed in Plaintiff's central file.
17 (UF 20.)

18 Plaintiff further contends that Defendant used his position, title, and rank (1) to try to
19 coerce Plaintiff into doing his bidding (assist in the "positive programming" of Hispanic
20 inmates), (2) to threaten Plaintiff (if he did not assist in the "positive programming" of
21 Hispanics), and then (3) to have Plaintiff assaulted (as a result of the alleged false sensitive needs
22 yard designation) to confirm the threat. (ECF No. 41 at 2.) However, as stated above, none of
23 Plaintiff's grievances make any mention of (1) Defendant or any other specific correctional
24 employee, or (2) any threat/ communication or conduct in retaliation for failing to assist with
25 positive programming of other inmates; the grievances make no claim that a false assertion was
26 made that he requested sensitive needs yard placement or that a false Form 114-D was placed in
27 Plaintiff's central file. In addition, appeal log numbers NKSP-D-18-02586 and NKSP-D-18-
28

1 02760 were properly rejected as procedurally deficient. (Magallanes Decl. ¶¶ 16-17, Exs. B &
 2 C.)

3 Lastly, Plaintiff contends that he wrote a grievance that specifically mentioned Defendant
 4 but it was returned for deficiencies and ultimately “disappeared” or was lost. (ECF No. 41 at 3;
 5 ECF No. 42 at 3.) Defendant argues that Plaintiff’s bald allegation that he filed a grievance
 6 which subsequently “disappeared” or was lost does not change the fact that the generally
 7 available administrative remedies were available to him when he filed suit, and Plaintiff could
 8 have followed up on his missing or lost grievance, but chose not to do so. The Court agrees.

9 Although Plaintiff asserts that he submitted a grievance that was lost or disappeared, he
 10 offers no details as to the exact content of the grievance, to whom the request was made, when
 11 the request was made, or whether he followed up on the request (e.g., Plaintiff did not file any
 12 grievance or document asking what happened to his grievance that “disappeared” or was lost).
 13 Plaintiff’s bald and conclusory assertion that he submitted a “grievance” that disappeared does
 14 not overcome Defendant’s evidence that he failed to submit a grievance regarding the claims at
 15 issue in this action. Cf. Dennis v. Castrillo, No. 2:19-cv-00828-JAM-JDP (PC), 2021 WL
 16 5165219, at *4 (E.D. Cal. Nov. 5, 2021) (“In the absence of something more than bare
 17 allegations, plaintiff cannot be found to have created a genuine dispute of fact over whether the
 18 grievance system was unavailable to him.”); see also F.T.C. v. Publ’g Clearing House, Inc., 104
 19 F.3d 1168, 1171 (9th Cir. 1997) (“A conclusory, self-serving affidavit, lacking detailed facts and
 20 any supporting evidence, is insufficient to create a genuine issue of material fact.” (citations
 21 omitted)); Jackson v. Baca, No. 12-cv-10393 JLS, 2018 WL 1916307, at *6 * (C.D. Cal. Feb. 13,
 22 2018 (“‘[V]ague assertion[s]’ that prison officials did not process an inmate’s appeals, or
 23 ‘stopp[ed] them from being processed,’ are insufficient to create a genuine factual dispute
 24 regarding the availability of a remedy.” (alterations in original) (collecting cases)). This is so
 25 because if a prisoner could simply declare that a unspecified grievance was lost or disappeared,
 26 without providing any supporting facts or evidence, any prisoner could avoid exhausting
 27 administrative remedies by simply making such bald statements. See, e.g., Draper v. Rosario,
 28 836 F.3d 1072, 1080 (9th Cir. 2016) (the Ninth Circuit dismissed the prisoner’s “unsupported

1 allegations" that prison officials "prohibited and impeded" efforts to exhaust because such
2 allegations were "insufficient to create a triable issue of material fact," and the prisoner failed to
3 rebut evidence of non-exhaustion); see also Millner v. Biter, No. 1:13-cv-02029-AWI-SAB (PC),
4 2017 WL 735688 (E.D. Cal. Feb. 24, 2017) (remedies remained available where inmate failed to
5 show he "took all reasonable and appropriate steps in presenting the grievance in a timely
6 manner, or that any officials' failure to respond to it occurred not through his own fault, and there
7 was no evidence that prison official engaged in any misconduct regarding plaintiff's ability to
8 exhaust administrative remedies.") Accordingly, Defendant has met his burden of showing that
9 administrative remedies were available and that Plaintiff did not exhaust them with respect to
10 claims at issue in this action and the motion for summary judgment should be granted.

11 7. Dismissal of Unidentified Doe Defendants Pursuant Rule 4 (m)

12 Plaintiff's claims against the unidentified Doe Defendants remains. Although "the use of
13 'John Doe' to identify a defendant is not favored," Gillespie v. Civiletti, 629 F.2d 637, 642 (9th
14 Cir. 1980), "where the identity of the alleged defendant is not known prior to the filing of a
15 complaint, the plaintiff should be given the opportunity through discovery to identify the
16 unknown defendants, unless it is clear that discovery would not uncover the identities, or that the
17 complaint would be dismissed on other grounds," Wakefield v. Thompson, 177 F.3d 1160, 1163
18 (9th Cir. 1999).

19 Here, the Court accorded Plaintiff this opportunity in its April 2021 service order,
20 explaining that the three unidentified ICC members could not be served before being identified
21 and noting that Plaintiff could move to substitute the named Defendants once their identity was
22 ascertained. (ECF No. 21 at n.1.) The October 12, 2021 scheduling order provided that the
23 parties could amend the pleading on or before April 12, 2022, and the discovery deadline was set
24 for June 12, 2022. (ECF No. 36.) Plaintiff has not moved to amend his complaint, moved to
25 substitute the Doe Defendants, or otherwise notified the Court of the identity of Doe Defendants.

26 Pursuant to Rule 4 of the Federal Rules of Civil Procedure, "[i]f a defendant is not served
27 within 90 days after the complaint is filed, the court—on motion or on its own after notice to the
28 plaintiff—must dismiss the action without prejudice against that defendant or order that service

1 be made within a specified time. But if the plaintiff shows good cause for the failure, the court
2 must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m). This 90-day
3 deadline under Rule 4(m) applies to service on unnamed defendants. See Bulgara v. Cty. of
4 Stanislaus, No. 1:18-cv-00804-DAD-SAB, 2020 WL 5366306, at *5 (E.D. Cal. Sept. 8, 2020),
5 report and recommendation adopted, No. 1:18-cv-00804-DAD-SAB (PS), 2021 WL 1105255
6 (E.D. Cal. Mar. 23, 2021) (dismissing action against “Doe defendants” for failure to serve
7 within Rule 4(m)’s 90-day deadline). In this case, well over 90 days have elapsed since the filing
8 of Plaintiff’s complaint on November 9, 2020. Plaintiff has therefore failed to serve
9 the Defendant Does in compliance with Rule 4(m).

10 In addition to Rule 4(m)’s requirements, “a court may dismiss a defendant, a claim[,] or
11 an action based on a party’s failure to prosecute an action[,] failure to obey a court order, or
12 failure to comply with local rules.” Bulgara, 2020 WL 5366306, at *5 (citing Ferdik v. Bonzelet,
13 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
14 amendment of complaint), Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir.
15 1986) (dismissal for failure to prosecute and to comply with local rules)). Plaintiff received
16 advisement that he was required to amend his complaint to identify the Doe Defendants so that
17 the complaint could be served. (ECF No. 21.) Discovery has closed and the deadline to amend
18 the pleadings has passed without Plaintiff filing anything to indicate that he has identified the
19 Doe Defendants.

20 Where Plaintiff has failed to effect service in accordance with Rule 4(m) and has failed to
21 comply with the orders instructing him to identify the defendant before the close of
22 discovery, dismissal of the Doe Defendants is warranted. See Williby v. California, 276 F. App’x
23 663, 665 (9th Cir. 2008) (holding district court’s sua sponte dismissal of Doe defendants was
24 merited where plaintiff had failed to identify defendants within allotted discovery
25 period); Bulgara, 2020 WL 5366306, at *5 (recommending dismissal of Doe defendants, without
26 additional notice, for failure to effect service under Rule 4(m) where defendants were not
27
28

1 identified within the allotted discovery period). Accordingly, the Doe Defendants should be
2 dismissed from this action.

3 **IV.**

4 **RECOMMENDATIONS**

5 Based on the foregoing, it is HEREBY RECOMMENDED that:

6 1. Plaintiff's motion for discovery (ECF No. 41) be DENIED; and
7 2. Defendant's exhaustion motion for summary judgment (ECF No. 38) be granted;
8 3. The Doe Defendants be dismissed from the action for failure to serve process
9 pursuant to Federal Rule of Civil Procedure 4(m); and
10 4. The instant action be dismissed, without prejudice.

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-**
13 **one (21) days** after being served with these Findings and Recommendations, the parties may file
14 written objections with the Court. The document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." The parties are advised that failure to file objections
16 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler,
17 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
18 1991)).

19
20
21 IT IS SO ORDERED.

22 Dated: December 2, 2022


23

UNITED STATES MAGISTRATE JUDGE
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